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No. 80- .

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

TEXTRON, INC.,
PETITIONER,

v.

VALENTINE R. CICCONE,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Question Presented.

Did the First Circuit err, on remand, by reading *Mohasco Corp.* v. *Silver*, as an absolute prohibition against implicit time limitations being read into discrimination statutes irrespective of Congressional intent?

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Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Opinions Below.

On remand from this Court the Court of Appeals issued a per curiam order, which has not yet been officially reported. That order dated January 19, 1981 appears as Appendix D. The original opinion of the First Circuit is reported at 616 F.2d 1216 (CA 1 1980) and appears as Appendix B to this petition. The opinion of the United States District Court for the District of Rhode Island, not reported, appears as Appendix A to the petition.

Jurisdiction.

On remand from this Court, the Court of Appeals for the First Circuit entered judgment in this case on January 19, 1981. This petition for certiorari was filed within 90 days of the entry of judgment below. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

Statute Involved.

The Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.* (hereinafter referred to as ADEA), will be generally referred to and the specific sections of that Act which will be called upon for interpretation and application are as follows: 29 U.S.C. § 626(d) provides:

> (d) No civil action may be commenced by any individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed —
>
> (1) within 180 days after the alleged unlawful practice occurred, or
>
> (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred; or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

29 U.S.C. § 633(b) provides:

> (b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination

in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of 60 days after proceedings have been commenced under the State Law, unless such proceedings have been earlier terminated. . . .

Statement of the Case.

I. Facts.

On May 26, 1977, Valentine Ciccone was terminated as vice-president-administration of the Homelite Division of Textron, Inc. Prior to holding that position, Mr. Ciccone had been vice-president-administration at the Gorham Division of Textron.

In January, 1978 Ciccone, having learned his former position as vice-president-administration at Gorham was vacant, wrote to Joe Collinson,* then President of Textron, to inquire about "the possibility of returning to Gorham." Mr. Collinson responded that he did not "think it was a good idea."

On August 2, 1978, Ciccone filed age discrimination charges in Rhode Island (principal place of business of Textron and Gorham), North Carolina (principal place of business of Homelite) and the U. S. Department of Labor claiming the Homelite termination and the refusal to reemploy at Gorham were acts of age discrimination. Suit was instituted on October 11, 1978 in the United States District Court for the District of Rhode Island.

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* A defendant below, but now deceased and no longer a party to these proceedings.

II. Procedural History.

In the district court, defendants moved to dismiss the complaint, among other reasons, for plaintiff's failure to file his complaint with a state or federal agency within 180 days of the alleged acts of discrimination. Plaintiff's concurrent state and federal filings were more than 300 days after the Homelite termination and 205 days after the refusal to reemploy. The district court dismissed the complaint holding:

(1) As to the Homelite termination, the federal filing, being more than 300 days after the termination, was untimely, and

(2) As to the refusal to reemploy at Gorham, plaintiff, having failed to file his state claim within the initial 180-day filing period, was not entitled to the extended 300-day period and consequently his federal filing, being more than 180 days after the alleged act of discrimination, was untimely. Ciccone appealed the latter holding. The Circuit affirmed, noting that claimant had also failed to file with the state within limitation period for state enforcement proceedings. *Ciccone* v. *Textron, Inc.*, 616 F.2d 1216, 1220 n.7 (CA 1 1980) (Appendix B). Ciccone petitioned for certiorari. On June 23, 1980 this Court issued its opinion in *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 100 S. Ct. 2486 (1980), and on October 20, 1980, granted Ciccone's petition for certiorari, vacated the circuit court judgment and remanded for further consideration in light of *Mohasco*. *Ciccone* v. *Textron, Inc.*, ____ U.S. ____, 101 S. Ct. 311 (1980) (Appendix C). The Circuit, reading *Mohasco* as a flat prohibition against time limitations being read into discrimination statutes, irrespective of Congressional intent, reversed its prior position (Appendix D). Textron, Inc., now brings this petition for certiorari seeking review of the Circuit's new opinion.

Reasons for Granting the Writ.

ON REMAND, THE CIRCUIT ERRONEOUSLY CONSTRUED MOHASCO CORP. V. SILVER, AS AN ABSOLUTE PROHIBITION AGAINST TIME LIMITATIONS BEING READ INTO DISCRIMINATION STATUTES, IRRESPECTIVE OF CONGRESSIONAL INTENT, THEREBY RENDERING MOHASCO INCONSISTENT WITH PRIOR DECISIONS OF THIS COURT.

The Court, in *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 100 S. Ct. 2486 (1980) held that a Title VII claimant must file with the state agency within 240 days of the alleged act of discrimination in order to comply with Title VII's 300 day filing requirement. The Court concluded that Title VII claimants are obligated to initially file with the state and the state has exclusive jurisdiction for 60 days, thus the state filing must precede the federal filing by 60 days.

The employer in *Mohasco* had also argued that Title VII's extended 300-day filing period was only available to those who pursued state remedies within Title VII's initial 180 day filing period. In notes, the Court rejected that contention. The Court noted that the language of the statute did not compel such a result nor was there firm evidence that such result was intended by Congress. The Court held that, under such circumstances, the Court should not read implicit time limitations into discrimination statutes, citing *Occidental Life Insurance Company* v. *EEOC*, 432 U.S. 355 (1977). In passing, the Court noted that the First Circuit had accepted a similar argument by an employer in an ADEA case. See *Mohasco Corp.* v. *Silver*, 807 U.S. 814 n.16 & 816 n.19 (1980).

The First Circuit had previously held that an ADEA claimant must file his state claim within the 180-day period provided by § 626(d)(1) in order to obtain the benefit of the extended 300-day filing period. *Ciccone* v. *Textron, Inc.*, *supra*.

This Court vacated the Circuit judgment in *Ciccone* and remanded the matter to the Circuit for further consideration in light of *Mohasco*.

The Circuit's opinion, on remand, makes clear that the Circuit's analysis of the legislative history and statutory scheme of the ADEA requires it to conclude that Congress intended that the extended filing period of § 626(d)(2) be available only to those who have commenced state proceedings within the 180-day filing period of § 626(d)(1). It is equally clear, however, that the Circuit is of the opinion that *Mohasco* prohibits the Circuit from relying on Congressional intent because it would require the Circuit to "read in a time limitation provision" not required by the "plain meaning of the statutory language."

The Circuit's reading of *Mohasco* is too broad and renders *Mohasco* inconsistent with *Occidental Life Insurance Company* v. *EEOC*, 432 U.S. 355 (1977).

Mohasco was decided on grounds unrelated to the present dispute. In notes 16 and 19, the *Mohasco* court rejected an implicit time filing requirement not contained in the literal language of the Act because:

(1) The plain meaning of the statutory language did not require it, *and*

(2) The legislative history was equivocal.

Citing *Occidental Life Insurance Company* v. *EEOC*, the Court held that under such circumstances, the Court should not read time limitations into remedial statutes where laymen initiate the process.

In *Occidental*, the employer argued that Title VII contained implicit time limitations for institution of EEOC enforcement actions. The Court, after reviewing the Title VII legislative history, stated:

> Only if the legislative history of § 706(f)(1) provided firm evidence that the subsection cannot mean what it so

clearly seems to say would there be any justification for construing it in any other way. But no such evidence is to be found.

Occidental Life Insurance Company v. *EEOC*, 432 U.S. at 361.

Thus, it is apparent that *Mohasco* does not represent an absolute ban on reading implicit time limitations into discrimination statutes, but prevents it *unless* there is "firm evidence" that Congress intended such a result. In *Mohasco*, the Court found that the statutory language was plain and the legislative history equivocal. Under such circumstances, the Court refused to read a time limitation into Title VII.

In order for the First Circuit to comply with this Court's order to reconsider in light of *Mohasco*, the Circuit should have examined the ADEA's statutory language, scheme and legislative history to determine whether its language was plain or if "firm evidence" was to be found in the legislative history indicating that a non-literal interpretation was intended by Congress. If there is no evidence in the ADEA legislative history that Congress intended anything other than what the statutory language appears to say, or the legislative history was equivocal, the Circuit should adopt a literal interpretation.

If on the other hand, there is:

(1) no support in the legislative history for a literal interpretation; and

(2) a literal interpretation would be at war with other clear Congressional purposes expressed in the legislative history; and

(3) there is clear, firm evidence in the legislative history that a non-literal interpretation was intended; then the Circuit should have affirmed its original opinion. In fact, the Circuit indicated it would have done so if permitted to consider the

legislative history and only refused to do so because it considered *Mohasco* to be an absolute ban on implied time limitations being read into discrimination statutes.

The anomolous result of the Circuit's reading of *Mohasco* is that every circuit that has reviewed the statutory scheme and legislative history of the ADEA has concluded that an implicit time limitation was intended.* Nonetheless, those same circuits, reading *Mohasco* as rendering the legislative history irrelevant, have now concluded they are flatly prohibited from adopting a non-literal interpretation.** This is true even though this Court did not review the ADEA legislative history in *Mohasco*.***

Nor can it be argued that consideration of the ADEA's legislative history need not be considered because the ADEA and

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* *Ciccone* v. *Textron, Inc.*, 616 F.2d 1216 (CA 1 1980); *Ewald* v. *Great Atlantic & Pacific Tea Co.*, 620 F.2d 1183 (CA 6 1980); *Davis* v. *Calgon Corp.*, 22 FEP Cases 1761 (CA 3 1980).

The Ninth Circuit reached the opposite conclusion, *Bean* v. *Crocker National Bank*, 600 F.2d 754 (CA 9 1979) but did not review the legislative history. The Second Circuit, post-*Mohasco*, has followed the Ninth Circuit, also without review of the legislative history. *Goodman* v. *Heublein, Inc.*, #80-7685 (CA 2 March 25, 1981).

** *Ciccone* v. *Textron, Inc.* (Appendix D); *Ewald* v. *Great Atlantic & Pacific Tea Co.*, #77-1600 (CA 6 January 6, 1981); *Davis* v. *Calgon Corp.*, 627 F.2d 674 (CA 3 1980).

*** The Court did conduct such review in *Oscar Meyer & Co.* v. *Evans*, 441 U.S. 750 (1979) where it was contended that compliance with state filing requirements was an ADEA jurisdictional prerequisite. This Court rejected that contention since it allowed, in effect, the states to determine when claimants must file under the ADEA. The Court held that a uniform federal remedy was intended, not one that fluctuated dependent on the actions of local legislatures. To that extent, this Court has indicated that its review of the ADEA legislative history indicates that Congress intended a uniform filing requirement — a requirement of equal diligence by all — equal notice to all — which only is accomplished by requiring some filing (be it state or federal) within the 180 days provided by § 626(d)(1) of the Act. Only if notice is provided during that period by state filing is a claimant entitled to defer his federal filing for an additional 120 days.

Title VII are so similar that Congressional intent regarding Title VII is dispositive of ADEA questions. While there are substantial similarities between the filing requirements of Title VII and the ADEA, there is a critical difference indicating that the Congressional purposes in providing an extended filing period in deferral states are different for the ADEA and Title VII. Title VII mandates sequential state and federal filings while the ADEA permits concurrent filings. Originally, Title VII required a federal filing within 90 days but also prohibited federal filing in deferral states for as long as 120 days. The Act conflicted on its face. To resolve the conflict, Congress provided claimants in deferral states an additional 120 days for federal filing so their federal remedy would not be lost during the mandatory deferral period. See *Mohasco Corp.* v. *Silver*, *supra*, at 477 U.S. at 821, 100 S.Ct. 2494 ("and § 706(d)'s longer time of 210 days for filing with the EEOC in deferral States was included to prevent forfeiture of a complainant's federal rights while participating in state proceedings.")

The ADEA does not mandate sequential filing. The provisions of the Act do not conflict. An ADEA claimant's federal rights are not jeopardized during participation in state proceedings because ADEA claimants, unlike Title VII claimants, are not required to delay their federal filing during a period of exclusive state jurisdiction. Unlike Title VII, no extended filing period is necessary to reconcile other provisions of the ADEA. Therefore, the Title VII legislative history is not dispositive of Congress' purposes in providing an ADEA extended filing period. Since Congressional intent relating to the ADEA was not reviewed in *Mohasco*, *Mohasco* cannot be dispositive of the question now before the Court.

Thus the only manner in which the Circuit could reverse its prior opinion, without a review of the legislative history, is to treat *Mohasco* as an absolute ban on implicit time limitation being read into discrimination statutes — irrespective of Congress' intent.

Conclusion.

Unless this Court shares the First Circuit's interpretation of *Mohasco*, a writ of certiorari should issue to review the judgment and opinion of the First Circuit.

Respectfully submitted,

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Appendix A.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

VALENTINE R. CICCONE	)	
	)	
v.	)	Civil Action No. 78-0564
	)	
TEXTRON, INC. and	)	
JOSEPH B. COLLINSON	)	

Opinion.

PETTINE, Chief Judge. This is an action under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.* Plaintiff alleges that the defendants illegally based their decision to terminate his employment with the Homelite division of Textron upon his age. He further alleges that illegal age discrimination is the basis for the defendants' refusal to rehire him in his former position in the Gorham division of Textron or in any other position with Textron. Jurisdiction is premised upon 28 U.S.C. § 1337.

The defendants now move for dismissal of the action on the bases that plaintiff failed to file timely charges with the Secretary of Labor, a prerequisite to obtaining judicial relief under the ADEA, and that plaintiff failed to file timely proceedings with the appropriate state agency, also allegedly a prerequisite to suit under the ADEA.[1] In response, plaintiff

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[1] While it is clear that the filing of charges with the Secretary of Labor is a prerequisite to suit under the ADEA, the courts have differed on whether resort to an appropriate state agency is also a prerequisite. *Compare Reich* v. *Dow Badische Co.*, 575 F.2d 363 (2d Cir. 1978), *cert. denied*, 47 U.S.L.W. 3391 (Dec. 4, 1978) (No. 78-5568) and *Hadfield* v. *Mitre Corp.*,

argues that he has fulfilled the appropriate requirements. For the reasons which follow, the Court finds that the plaintiff has failed to fulfill the requirements of the ADEA, but may attempt to prove facts which might entitle him to equitable consideration tolling the time within which he had to file.

Plaintiff was employed until May 26, 1977 as Vice President-Administration of the Homelite Division of Textron, Inc. at its principal offices in Charlotte, North Carolina. Prior to this, he had held the same job with the Gorham Division of Textron. On May 26, 1977 his employment was terminated, and plaintiff did no work for Textron subsequent to that date. He did, however, continue to receive pay and benefits through August 31, 1977, and received in a lump sum an additional three months' pay in early September, 1977. The plaintiff was unable to obtain another job. On January 4, 1978, after learning that his former position at Gorham was now vacant, he wrote the defendant Collinson, President of Textron, requesting reemployment in his former position or any similar position that might be available. On January 9, Mr. Collinson wrote that "it would be a mistake for you to return to Gorham, but if any other position becomes available in which I think you would be interested, I'll contact you." The position at Gorham has remained unfilled. Plaintiff was not contacted subsequently regarding any employment possibilities.

On August 2, 1978, plaintiff mailed a charge of age discrimination to the Charlotte-Mecklenburg Community Relations Committee, an agency of the state of North Carolina. He sent the same charge to the Director of Labor of the State

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459 F.Supp. 829 (D. Mass. 1978) (state filing a prerequisite) *with Holliday* v. *Ketchum, MacLeod & Grove, Inc.*, 584 F.2d 1221 (3d Cir. 1978) (en banc) and *Evans* v. *Oscar Mayer & Co.*, 580 F.2d 298 (8th Cir. 1978), *cert. granted*, 47 U.S.L.W. 3301 (Oct. 30, 1978) (No. 78-275) (state filing not a prerequisite). Because of the result reached in this case, the Court does not reach this issue.

of Rhode Island and the United States Department of Labor in Charlotte and in Providence on that day. On October 10, 1978, he filed the current action.

29 U.S.C. § 626(c) authorizes an individual to bring a civil action for relief from age discrimination.[2] Section 626(d) states that such a civil action cannot be commenced unless a charge alleging unlawful discrimination is filed with the Secretary of Labor within 180 days after the discriminatory practice occurred and 60 days has elapsed following the filing of the charge. Howeyer, if a state has a law prohibiting age discrimination and "establishing or authorizing a State authority to grant or seek relief from such discriminatory practice", 29 U.S.C. § 633, the individual has 300 days to file with the Secretary of Labor. 29 U.S.C. § 626(d)(2).[3]

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[2] 29 U.S.C. § 626(c) provides:

(c)(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

[3] 29 U.S.C. § 626(d) provides:

(d) No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed —

(1) within 180 days after the alleged unlawful practice occurred;

or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Secretary shall promptly notify all persons named in such charge as prospective defendants in the action and shall

Defendants contend that the August 2, 1978 filing was more than 180 days after the May 26, 1977 termination and that therefore he is barred from bringing this action. Plaintiff responds that the actual termination date was November 30, 1977, because he received 6 months' severance pay, and that the 300-day requirement of section 626(d)(2) applies because he filed charges with the appropriate state agencies on August 2, 1978. These arguments must be rejected.

Numerous courts have faced the question of what constitutes the termination date when the date at which the employee ceased to work or was notified of his termination differs from the administrative termination date or the end of severance benefits. *See, e.g., Bonham* v. *Dresser Industries, Inc.*, 569 F.2d 187 (3d Cir. 1977), *cert. denied* 47 U.S.L.W. 3221 (U.S. Oct. 2, 1978); *Kephart* v. *Institute of Gas Technology*, 581 F.2d 1287 (7th Cir. 1978); *Payne* v. *Crane Co.*, 560 F.2d 198 (5th Cir. 1977); *Moses* v. *Falstaff Brewing Corp.*, 525 F.2d 92 (8th Cir. 1975), *on remand*, 13 FEP Cases 347 (E.D.Mo. 1975), *aff'd*, 550 F.2d 1113 (8th Cir. 1977); *Davis* v.

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promptly seek to eliminate any alleged unlawful practice by informal methods of concilation, conference, and persuasion.

29 U.S.C. § 633(b) provides:

(b) In the case of an alleged unlawful practice occuring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: *Provided*, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

RJR Foods, Inc., 420 F.Supp. 930 (S.D.N.Y. 1970), *aff'd without opinion*, 556 F.2d 555 (2d Cir. 1977). With the exception of *Moses*, these decisions all held that the filing period of section 626(d) begins to run when the employee has been given unequivocal notice of termination and he in fact ceases to work for the employer. The Court finds the reasoning of the *Bonham* decision particularly persuasive:

> We reject the rule propounded in [*Moses*] which looks exclusively to the company's official termination date as reflected in company records. Because . . . a company may use different termination dates for different purposes, the *Moses* rule does not adequately resolve the issue. Moreover, we would be wary of any approach which determines the timeliness of an employee's suit against his employer solely on the basis of records which are within the exclusive control of the employer. On the other hand, we would also view with disfavor a rule that penalizes a company for giving an employee periodic severance pay or other extended benefits after the relationship has terminated rather than severing all ties when the employee is let go.

569 F.2d at 191.

Moses involved a peculiar fact situation; there the plaintiff's final day of work was followed by a previously scheduled week of vacation and then a previously accrued week of vacation before the company considered her officially terminated. The employer had recognized the later date as the termination date for the purposes of its personnel records, although the trial court later found that it did continue to pay severance pay for seven additional months. *Moses* v. *Falstaff Brewing Corp.*, 13 FEP Cases 347, 348 (E.D. Mo. 1976), *aff'd*, 550 F.2d 1113

(8th Cir. 1977). The Court held that the official termination date should be controlling, in order to eliminate ambiguity and further the humanitarian purposes of the act, and in light of the short period of time between when Ms. Moses stopped work and was terminated for administrative purposes. No other circuit court has reached the same result. Furthermore, *Moses* is not inconsistent with the holdings in *Kephart*, *Bonham*, *Davis*, and *Payne*, *supra*, that the continuance of severance pay beyond the date on which a plaintiff ceases to work does not toll the running of the filing period.

Consequently, the Court finds that for the purposes of section 626(d) plaintiff was terminated on May 26, 1977. Therefore, his filing with the Secretary of Labor on August 2, 1978, 433 days after termination, was untimely, whether the 180-day or 300-day period applies.

Plaintiff argues, however, that he is entitled to equitable modification of the time limit for filing charges. Although a few courts have reached the opposite conclusion, *see*, *e.g.*, *Raynor* v. *Great Atl. & Pac. Tea Co.*, 400 F.Supp 357 (E.D. Va. 1975), most courts faced with the issue have held that the time requirements of ADEA are not jurisdictional prerequisites to maintaining an action, rather that they operate more in the nature of a statute of limitation and hence are subject to equitable modifications, such as tolling and estoppel. *See Gabriele* v. *Chrysler Corp.*, 573 F.2d 949 (6th Cir. 1978), *petition for cert. filed*, 47 U.S.L.W. 3009 (U.S. July 18, 1978) (No. 78-1); *Bonham* v. *Dresser Industries, Inc.*, *supra*; *Dartt* v. *Shell Oil Co.*, 539 F.2d 1256 (10th Cir. 1976), *aff'd by an equally divided court*, 434 U.S. 99 (1977); *Skoglund* v. *Singer Co.*, 403 F.Supp. 797 (D.N.H. 1975).

This approach was approved by the Conference Report accompanying the Age Discrimination in Employment Act Amendments of 1978, P.L. 95-256, codified at 29 U.S.C. §§ 621 *et seq*. Although the amendments did not change the statutory provision, the report noted:

> The conferees agree that the "charge" requirement is not a jurisdictional prerequisite to maintaining an action under the ADEA and that therefore equitable modification for failing to file within the time period will be available to plaintiffs under this Act. *See e.g. Dartt* v. *Shell Oil Co.*, 539 F.2d 1256 (10th Cir. 1976), aff'd by an evenly divided court, [434 U.S. 99,] 98 S.Ct. 600 (1977); *Bonham* v. *Dresser Industries, Inc.*, [569 F.2d 187] (3d Cir. 1977), *cert. denied*, 47 U.S.L.W. 3221 (Oct. 2, 1978)]; *Charlier* v. *S.C. Johnson & Son, Inc.*, 556 F.2d 761 (5th Cir. 1977).

Conf. Rep. No. 95-950, 95th Cong., 2nd Sess. 12 (1978). Although this statement is not entitled to the same weight as the legislative history compiled by the Congress which adopted the act, *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1963), it suggests strongly that Congress approves this approach to the ADEA's filing periods.

Additionally, this Court has held in an analogous context that the similar time periods required in Title VII cases are non-jurisdictional and subject to equitable modification. *Partin* v. *Hemingway Transport, Inc.*, C.A. No. 75-149, slip op. at 7 (D.R.I. Nov. 8, 1976). This Court also notes that the ADEA is remedial and humanitarian legislation which should therefore be accorded a liberal interpretation, and that "strict compliance with section 626(d)(1)'s time limitation should not be required of laymen attempting to enforce their statutory rights." *Dartt* v. *Shell Oil Co.*, 539 F.2d at 1260 and cases cited therein. We hold, therefore, that the filing time requirements of section 626(d) are subject to equitable modification and estoppel.

Judge Bownes, in *Abbott* v. *Moore Business Forms, Inc.*, 439 F.Supp. 643 (D.N.H. 1977), noted five considerations that indicate the tolling of the statute might be proper:

> Factors suggesting the appropriateness of tolling and which must be weighed in this case include: lack of actual notice of the filing requirement, *Powell* v. *Southwestern Bell Telephone Company*, 494 F.2d 485, 487 (5th Cir. 1974); lack of constructive knowledge, *e.g.* as where one has secured an attorney, who is thereby charged with presumptive knowledge of the law's requirements, *Edwards* v. *Kaiser Aluminum & Chemical Sales, Inc.*, 515 F.2d 1195, 1197 (5th Cir. 1975); diligence in pursuing one's rights, *Dartt* v. *Shell Oil Co.*, *supra*; absence of prejudice to defendant, *Love* v. *Pullman Co.*, *supra*, 404 U.S. at 526 (1972); plaintiff's reasonableness in remaining ignorant of the notice of requirement *cf. Melendez* v. *Singer-Friden Corp.*, 529 F.2d 321, 324-325 (10th Cir. 1976).

439 F.Supp. at 646.

As the discussion below indicates, these factors are particularly applicable in the present case.

Plaintiff has submitted an affidavit which states that prior to July 25, 1978 he had no knowledge of the notice provisions of the ADEA, that he had at no time while employed by Textron been advised of his rights under the ADEA, and that Textron did not post notices pertaining to the ADEA in places prominent and accessible to him as is required by 29 U.S.C. § 627 and 29 C.F.R. § 850.10.[4] As Judge Bownes noted in

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[4] 29 U.S.C. § 627 provides:

> Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Secretary setting forth information as the Secretary deems appropriate to effectuate the purposes of this chapter.

Abbott, supra, failure to be aware of one's rights is a factor which should be considered in determining whether to toll the filing time requirement. Additionally, several cases have suggested that where an employer has failed to post the notice required by section 627, the employee can be excused from his failure to file timely notice of intent to sue. *Bonham* v. *Dresser Industries, Inc., supra*; *Charlier* v. *S.C. Johnson & Son, Inc., supra*; *Edwards* v. *Kaiser Aluminum & Chemical Sales, Inc., supra*; *Skoglund* v. *Singer Co., supra*.

However, the defendants have submitted an affidavit which states that the plaintiff, as Vice President-Administration for the Homelite Division, was responsible for all personnel functions, including insuring that the ADEA notices were prominently posted. The affidavit of Robert Babb states that the required posters were posted on bulletin boards in Homelite's Personnel Department within two weeks of the September 5, 1975 date Homelite moved into its present facilities; that they have been posted there continuously; and that the plaintiff frequently passed the bulletin board. Additionally, two further affidavits testify to the continuous presence of these posters on the Personnel Department's bulletin board. Such evidence, if believed, not only controverts plaintiff's affidavit but would suffice to put plaintiff, at a minimum on constructive notice of the ADEA's requirements. If plaintiff was responsible for informing employees of their rights, by insuring that the ADEA

The Secretary has implemented this provision through promulgation of 29 C.F.R. § 850.10, which provides:

> Every employer, employment agency, and labor organization which has an obligation under the Age Discrimination in Employment Act of 1967 shall post and keep posted in conspicuous places upon its premises the notice pertaining to the applicability of the Act prescribed by the Secretary of Labor or his authorized representative. Such a notice must be posted in prominent and accessible places where it can readily be observed by employees, applicants for employment and union members.

notices were posted, he quite clearly would be estopped from asserting his own ignorance. *Adams* v. *Federal Signal Corp.*, 559 F.2d 433 (5th Cir. 1977); *Malinowski* v. *State Farm Ins. Co.*, 18 FEP Cases 693 (W.D.Pa. 1978); *Skoglund* v. *Singer Co.*, 13 FEP Case 253 (D.N.H. 1975) (dismissing *Skoglund* v. *Singer*, 403 F.Supp. 797, following factual hearing). Similarly, if he regularly passed by the bulletin board upon which the notice was posted, he would have to be held to constructive notice. Because these affidavits are in conflict, it is necessary to hold a hearing at which plaintiff may present evidence as to his entitlement to the exercise of equitable considerations for his failure to timely file. In determining whether to exercise its equitable discretion, the Court can of course consider any relevant factor; but it will consider in particular those outlined by Judge Bownes in *Abbott* v. *Moore Business Forms, Inc., supra.*

In addition to his claim for equitable considerations, plaintiff also argues that the refusal of defendant to rehire him on January 9, 1978, constituted a separate violation of the ADEA, and that the continuing refusal to rehire him after that date creates a continuing violation. The latter argument is of little merit. Virtually all the courts faced with such an allegation have held that in the absence of a contractual or other legal duty to rehire, refusal to rehire does not create a continuing violation tolling the filing deadlines. Continuing effect is not tantamount to continuing violation. *United Airlines* v. *Evans*, 431 U.S. 553 (1977) (Title VII); *In Re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F.2d 1142, 1149 (7th Cir. 1978) (Title VII); *Hiscott* v. *General Electric Co.*, 521 F.2d 632, 635 (6th Cir. 1975) (ADEA); *Powell* v. *Southwestern Bell Tel. Co.*, 494 F.2d 485 (5th Cir. 1974) (ADEA).

The only exception which this Court has discovered is *Thomas* v. *E.I. DuPont de Nemours & Co.*, 574 F.2d 1324 (5th Cir. 1978). There the court, while holding to its rule that

discharge followed by refusal to rehire does not create a continuing violation, *Woodburn* v. *LTV Aerospace Corp.* 531 F.2d 750 (5th Cir. 1976), did hold that DuPont's refusals to reinstate the plaintiff to his prior job, to transfer him back to his former location, or to hire him for a subsequent opening could constitute separate ADEA violations. The Court carefully limited the scope of its holdings, however:

> We in no way mean to indicate that once an employee goes on record to express displeasure with an employer's action and therafter holds his peace, the company can be liable for failing to remember the initial employee complaint every time a job for which he is qualified becomes available. Such a rule would be unfair, especially when a very large company like DuPont is involved. We merely hold that once 180 days have passed after one unlawful act, an employer cannot ignore repeated untime-barred attempts within the company to rectify the original wrong and thereby violate the ADEA anew with impunity.

574 F.2d at 1331.

Under even this more liberal approach, then, simply reapplying for one's old job cannot serve to begin the running of the 180-day period anew; there must clearly be a new, separate violation. Were simple reapplication allowed to start the time period anew, the purpose of the time limitation would be completely frustrated: a stale claim could be resurrected at any time by such action.

Consequently, even under the holding of the *Thomas* case, plaintiff's reliance on a continuing violation as the basis for tolling the filing time requirement must fail. He must allege a specific act; he cannot rely simply upon the language in the

letter sent to him by the defendant Collinson on January 9, 1978 that "if any other position becomes available in which I think you would be interested, I'll contact you" to establish a continuing series of refusals to rehire.

Plaintiff's suggestion that the refusal to rehire him in the Gorham division constitutes a separate violation has somewhat more merit, however. He did make a specific application for the job and was rejected by the letter of January 9. Defendants properly argue that, like allegations that a refusal to rehire constitutes a continuing violation, a refusal to rehire cannot constitute a separate violation. *In re Consolidated Pretrial Proceedings in the Airline Cases*, *supra*; *Clark* v. *Emerson Mfg. Co.*, 430 F.Supp. 216 (N.D. Miss. 1977); *Brohl* v. *Singer Co.*, 407 F.Supp. 936 (M.D. Fla. 1976); *Chant* v. *United States Postal Service*, 14 FEP Cases 839 (N.D. Tex. 1976). However, here the plaintiff is alleging a refusal to rehire for a different position, not simply an effort to be reinstated in the job from which he was terminated. Consequently, refusal to hire him for this position might be shown to be the result of a separate act of age discrimination.

Defendants, however, suggest that the January 9 rejection cannot constitute a separate violation inasmuch as the position was never filled. According to the uncontroverted affidavit of J. Joseph Kruse, Senior Vice President-Administration of Textron, the job of Vice President, Administration, at the Gorham Division "has not been filled since January 4, 1978, and presently does not exist, for the duties of such position have been delegated to other employees." In the absence of a position to be filled, it has been held that a refusal to hire cannot constitute a new violation. *Powell* v. *Southwestern Bell Tel. Co.*, 494 F.2d at 489. This removes the present case from the purview of *Thomas*, as well, inasmuch as the court there found the basis for a separate ADEA violation could exist in an allegation that a younger man was hired for a subsequent

opening for which the plaintiff had applied. 574 F.2d at 1331. Therefore, the Court concludes that plaintiff cannot rely upon the Jan. 9 refusal to rehire as a new violation.

Even were the Court to construe the Jan. 9 refusal to rehire as a separate violation, plaintiff's complaint would be time-barred. His August 2, 1978 notice to the Department of Labor was almost a month after the 180-day filing requirement. Plaintiff's argument that by filing with the appropriate state agencies on the same day, he is entitled to the 300-day period of section 626(d)(2), is without merit. In effect, he argues that the *federal cause* of action can be resurrected by filing with a state agency after the 180 days have passed. The Court must reject that argument. The purposes of the extended period when a claim is filed initially with a state agency are clearly to encourage resort to state remedies in the first instance and to allow the state time within which to attempt to resolve the complaint before federal intervention is triggered. Under plaintiff's interpretation, however, an individual could ignore with impunity the 180-day deadline, and by filing a complaint with both the state and the federal government on the 300th day, resurrect what was previously a time-barred complaint. As the Sixth Circuit noted in *Gabriele* v. *Chrysler Corp.*, *supra*:

> One obtains the benefits of the extended filing period in § 626 (d)(2) *only* if he is in a "deferral state" *and* elects to use that state's mechanisms to attempt a conciliation of the grievance. *Cf. Skoglund* v. *Singer Co.*, 403 F.Supp. 797, 803 (D.N.H. 1975) [failure to file state complaint before 180 days subjects plaintiff to 180 day filing requirement]. It is only if one uses time to let the state try its hand that he needs more time to notify the Secretary of Labor. Furthermore, any state filing need only be made within the minimum 180 days allowed for

> the federal filing, § 626(d)(1), in order to obtain the benefits of § 626(d)(2) (emphasis in original).

573 F.2d at 955.

Therefore, even if the Jan. 9 refusal to rehire is a separate violation, plaintiff's complaint is barred for failure to comply with section 626(d), unless, as with his complaint regarding his initial termination, discussed *supra*, he can demonstrate that he is entitled to equitable consideration.

The Court finds that, for the purposes of the filing requirements of 29 U.S.C. § 626(d), plaintiff's employment terminated on May 26, 1977. Consequently, his complaint is time-barred and this Court is without jurisdiction unless he can prove facts entitling him to equitable consideration in accordance with this opinion. The Court also finds that there is no continuing violation, and that the refusal to rehire on Jan. 9, 1978, did not constitute a separate violation. Finally, the Court finds that even if the Jan. 9 refusal to rehire constitutes a separate violation, it is also time-barred unless the plaintiff can demonstrate entitlement to equitable considerations. Because a hearing is necessary to prove such facts, the parties are given 60 days from the date hereof to complete discovery. The matter is assigned for hearing on April 25, 1979, at 8:30 a.m.

An order will be prepared in accordance with this opinion.

/s/_____

Raymond J. Pettine
Chief Judge
February 5, 1979

Appendix B.

Valentine R. CICCONE, Plaintiff, Appellant,

v.

TEXTRON, INC., et al., Defendants, Appellees.

No. 79-1541.

United States Court of Appeals,
First Circuit.

Argued Jan. 8, 1980.
Decided March 17, 1980.

The United States District Court for the District of Rhode Island, Raymond J. Pettine, J., granted summary judgment for defendant in age discrimination action, and plaintiff appealed. The Court of Appeals, Levin H. Campbell, Circuit Judge, held that age discrimination claim was barred by plaintiff's failure to file charge with the Department of Labor within 180 days of the most recent act of age discrimination alleged in the complaint, despite contention that alleged violation occurred in a "deferral state," and that, therefore, plaintiff was entitled to 300 days in which to file his charge with the Department of Labor, where plaintiff did not file charge with state agency within 180 days.

Affirmed.

1. Labor Relations — 20.5

Refusal to hire cannot constitute a new violation of the Age Discrimination in Employment Act in the absence of a job to

be filled. Age Discrimination in Employment Act of 1967, §§ 2-17, 29 U.S.C.A. §§ 621-634.

2. Labor Relations — 20.10

Charges of age discrimination must be filed with state agency in a "deferral state" within 180 days of alleged violation for plaintiff to qualify for the 300-day period within which to file federal charges. Age Discrimination in Employment Act of 1967, § 7(d)(2), 29 U.S.C.A. § 626(d)(2).

3. Labor Relations — 20.10

Age discrimination claim was barred by plaintiff's failure to file charge with the Department of Labor within 180 days of the most recent act of age discrimination alleged in the complaint, despite contention that alleged violation occurred in a "deferral state," and that, therefore, plaintiff was entitled to 300 days in which to file his charge with the Department of Labor, where plaintiff did not file charge with state agency within 180 days. Age Discrimination in Employment Act of 1967, § 7(d)(2), 29 U.S.C.A. § 626(d)(2).

Robert D. Parrillo, Providence, R.I., with whom A. Lauriston Parks and Hanson, Curran & Parks, Providence, R.I., were on brief, for plaintiff, appellant.

Michael P. DeFanti, Providence, R.I., with whom Daniel K. Kinder and Hinckley, Allen, Salisbury & Parsons, Providence, R.I., were on brief, for defendants, appellees.

Before COFFIN, Chief Judge, CAMPBELL and BOWNES, Circuit Judges.

LEVIN H. CAMPBELL, Circuit Judge.

Valentine R. Ciccone appeals from the district court's grant of summary judgment for defendants in this age discrimina-

tion action. The district court held that Ciccone's claim was barred by his failure to file a charge of age discrimination with the Department of Labor within 180 days of the most recent act of age discrimination he had alleged. Ciccone contends that the proper filing period should have been 300 days, as provided in 29 U.S.C. § 626(d)(2), because the alleged violations occurred in a so-called "deferral state." As we agree with the district court that the appropriate filing limit was 180 days, we affirm.

The Facts

Ciccone was born on May 18, 1924. From May 1971 to October 1974, he was employed by appellee Textron, Inc., as vice president, administration, of its Gorham Division. In October 1974 he became vice president, administration, in the Homelite Division of Textron. On May 26, 1977, he was terminated from his job at Homelite. Some seven months later, on January 4, 1978, believing that the position he once held at the Gorham Division was vacant, Ciccone wrote to Joseph B. Collinson, president of Textron, expressing an interest in "returning (again) to Textron."[1] Collinson responded by letter dated January 9, 1978, saying "it would be a mistake for you

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[1] Ciccone's letter read as follows:

> "Dear Joe:
> News has a way of travelling fast . . . I learned today that my 'old' job at Gorham has been vacated.
> Frankly, I would be interested in returning (again) to Textron, to this or any similar position which might present itself. I would appreciate hearing as to how best I could proceed to explore any such opportunity."

to return to Gorham, but if any other position becomes available . . . I'll contact you."[2]

On August 2, 1978, Ciccone filed charges of age discrimination with the United States Department of Labor and with the Rhode Island state agency designated for that purpose. These filings occurred 433 days after Ciccone's termination at Homelite and 205 days after Collinson's letter rejecting his application for the post at the Gorham Division. Sixty days passed without action by either state or federal authorities on Ciccone's claim. On October 10, 1978, Ciccone commenced this action in the district court alleging age discrimination in violation of the age Discrimination in Employment Act, (ADEA), 29 U.S.C. §§ 621-634.

In his district court complaint, appellant alleged, in substance, the facts recited above and stated that the conduct of defendants Textron and Collinson, "from and after May 26, 1977, with respect to the termination of the plaintiff's employment [*viz.* May 26, 1977] and refusal to consider the plaintiff for reemployment [*viz.* January 9, 1978] constitute[d] a continuing and willful violation of 29 U.S.C. § 623(a)." Defendants filed a motion to dismiss the complaint based on Ciccone's alleged failure to file timely charges with the federal and state agencies. Defendants also requested an order limiting discovery to the issue of subject matter jurisdiction until such time as the district court determined whether it had jurisdiction of the case. In support of their motion to dismiss, defendants filed an affidavit from J. Joseph Kruse, senior vice president, administration, of Textron, stating that the position of

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[2] Collinson's letter read as follows:

> "Dear Val:
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> I think it would be a mistake for you to return to Gorham, but if any other position becomes available in which I think you would be interested, I'll contact you."

vice president, administration, at Gorham formerly held by appellant had been discontinued and the duties of the job reassigned to other members of the staff.

On February 5, 1979, the district court ruled that the proper filing deadline for Ciccone's claim was 180 days, and that his claims of age discrimination were thus time-barred unless he could establish special facts justifying an equitable tolling of the time limit. This was the court's principal basis for decision, and if correct, plainly barred claims based both on the May 26, 1977 discharge and the refusal to rehire on January 9, 1978. However, the court went on to speculate, in the alternative, as to what would happen were it to rule that 300 rather than 180 days were available. Were 300 days the yardstick, Ciccone was still too late (absent equitable tolling) to contest the May 26 discharge. Only if the January 1978 exchange of letters evidenced an ongoing or later violation would the 300 days help. On this question, the court was of two minds. It rejected the notion that a simple refusal to rehire for the same job showed a "continuing" violation of the Act; but it saw possible merit in the theory that refusal to rehire for a different position might indicate a "separate" violation. Even so, however, the court felt that Ciccone had demonstrated no chance of prevailing here. According to the uncontradicted affidavit by Kruse, the Gorham job had been abolished by the time appellant applied. Thus the court saw no way Ciccone could prevail except by establishing an equitable tolling. On this issue alone, it allowed limited discovery to proceed.

On February 23, 1979, Ciccone's deposition was taken by counsel for defendants. In the course of his deposition, Ciccone stated that he had learned from sources at Gorham that his former position there had been filled by a younger man who had been given the title "Director of Administration." Appellant refused to name his sources. On the basis of this deposition, Ciccone then moved for reconsideration by the

district court of its earlier finding that the January 1978 refusal to rehire did not amount to a separate violation of the Act. On April 13, 1979, the district court entered an order refusing to reconsider its earlier ruling until appellant had established that he was entitled to an equitable tolling of the 180-day filing deadline. After an evidentiary hearing on this issue, at which appellant testified, the district court ruled that appellant had failed to establish sufficient grounds for an equitable tolling.[3] Accordingly, on October 10, 1979, the district court entered judgment for the defendants on their motion to dismiss, which was treated as a motion for summary judgment pursuant to Fed.R.Civ.P. 12(b)(6). This appeal followed.

I.

We turn first to appellees' contention that refusal to rehire Ciccone on January 9, 1978 did not and could not constitute a separate violation of the Act. This episode was the only purported violation which occurred within 300 days of Ciccone's filing of charges with the Department of Labor; hence if appellees are correct that the refusal to rehire was not a separate violation, it is irrelevant whether the proper filing limit was 300 days or 180. In either event appellant could not prevail. While it would be tempting to follow this route, thus avoiding the tricky problem of statutory interpretation involved in determining the proper time limit, we are unable to do so.

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[3] Since appellant does not challenge this finding on appeal, we have no occasion to decide under what circumstances, if any, the filing limitations of the ADEA are subject to equitable tolling. *Cf. Daughtry* v. *King's Department Stores, Inc.*, 608 F.2d 906, 909 (1st Cir. 1979) (per curiam). *Compare Dartt* v. *Shell Oil Co.*, 539 F.2d 1256 (10th Cir. 1976), *aff'd by an equally divided court*, 434 U.S. 99, 98 S.Ct. 600, 54 L.Ed.2d 270 (1977) with *Wright* v. *State of Tennessee*, 613 F.2d 647 (6th Cir. 1980).

[1] It is clear that the district court decided this case on the basis that 180 days rather than 300 days applied. Its ruminations on February 5 concerning the January 9 refusal to rehire were a kind of addendum to its basic holding that the 180-day limit applied; and they formed no part whatever of its final holding on October 10. In the initial, February 5, discussion the court said that merely refusing to rehire does not, by itself, establish a continuing violation. Such refusal, being but the natural consequence of the discharge, is attributable only to the earlier event. *See Goldman* v. *Sears, Roebuck & Co.*, 607 F.2d 1014, 1017-19 (1st Cir. 1979); *cf. United Airlines* v. *Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977). The district court opined, however, that refusal to rehire for a job different from the one to which the discharge related might be a sufficient basis for claiming a separate violation. On this reasoning, the court said that Ciccone's claim of a separate violation in January 1978 had "somewhat more merit" than his claim of continuing violation. Nevertheless, the court went on to reject Ciccone's claim of separate violation on the ground that defendants' then uncontroverted affidavit showed the job appellant had applied for at Gorham was discontinued. Since a refusal to hire cannot constitute a new violation in the absence of a job to be filled, see *Powell* v. *Southwestern Bell Telephone Co.*, 494 F.2d 485, 489 (5th Cir. 1974), the district court concluded that the refusal to rehire could not be a separate violation on the facts then before it.

This was how matters stood immediately after the court's February 5 decision. During the period the court allowed for discovery relating to the possibility of equitable tolling, however, the picture changed considerably. Ciccone claimed in his deposition that his old job at Gorham had been filled by a younger man who was given a different title; as a result, Ciccone moved to have the court reconsider its earlier holding that the January 9 incident was not a separate violation. The

district court refused reconsideration, ruling that even if a separate violation were shown, Ciccone's claim would nonetheless be barred by the 180-day limit. The final order issued October 10, 1979 thus rested entirely on the premise that the appropriate benchmark was 180 days rather than 300. Since appellant had alleged no instances of discrimination within 180 days of his filing of charges, and had established no equitable grounds for tolling the time limit, the district court held his claim barred.

Under these circumstances, we reject appellees' invitation to address the question whether the refusal to rehire in January 1978 was insufficient, for summary judgment purposes, to establish a violation of the Act. This was not an issue which ultimately played any part in the court's judgment nor is the proper resolution of this issue so plain on the present record as to invite us to avoid the question, decided below, of the proper filing limit under the ADEA.

II.

We turn, then, to the fundamental issue of the limitations period. As the case stands, legal proceedings were instituted more than 180 but less than 300 days after the last violation occurred. The statutorily conferred right to sue for relief from age discrimination is limited by 29 U.S.C. § 626(d),[4] which

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[4] Section 626(d), as amended in 1978, provides:

> "No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary [of Labor]. Such a charge shall be filed — (1) within 180 days after the alleged unlawful practice occurred; or (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

provides that no civil action may be commenced until 60 days after a "charge" of age discrimination has been filed with the Secretary of Labor. The statute goes on the state,

> "Such a charge shall be filed —
> (1) within 180 days after the alleged unlawful practice occurred; or
> (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier."

29 U.S.C. § 626(d). Section 633(b) concerns so-called "deferral states," *i.e.*, those having a state agency to which the individual must refer his claim at least 60 days before instituting his civil action.[5]

Upon receiving such a charge, the Secretary shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion."

[5] Section 633(b) provides:

> "In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: *Provided*, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes

[2, 3] Appellant argues that the alleged violation in this case occurred in Rhode Island, that Rhode Island is a "deferral state" within the meaning of § 633(b),[6] and that therefore under § 626(d)(2) he was entitled to 300 days in which to file his charge with the Department of Labor, regardless of when he filed his state charges. Appellees respond that the statute can be construed to give a plaintiff the benefit of the § 626(d)(2) extended filing period only if he has actually invoked the state remedy within 180 days of the alleged violation. Each party cites legislative history and recent decisions by other circuits in support of its position. Each relies on the Supreme Court's decision in *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 99 S.Ct. 2066, 60 L.Ed.2d 609 (1979). While the issue is close, we believe that appellees' interpretation is correct, and that charges of discrimination must be filed with the state agency in a deferral state within 180 days of the alleged violation for a plaintiff to qualify for the 300-day period within which to file federal charges.[7]

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of this subsection at the time such statement is sent by registered mail to the appropriate State authority."

[6] The Rhode Island age discrimination law, R.I. Gen.Laws tit. 28, c. 6, §§ 1-16, declares age discrimination to be unlawful and establishes a procedure for processing of age discrimination complaints. Given our disposition of this appeal, we do not consider whether Rhode Island is, by virtue of this statute, a deferral state for purposes of 29 U.S.C. § 633(b). *Compare Hadfield* v. *Mitre Corp.*, 562 F.2d 84 (1st Cir. 1977) (Massachusetts is a deferral state) with *Lugo Garces* v. *Sagner International, Inc.*, 534 F.2d 987 (1st Cir. 1976) (Puerto Rico is not a deferral state).

[7] Whether, as the district court and other courts believe, the statutory limitations may be subject to equitable amelioration in certain circumstances is an issue upon which we need express no opinion. *See* note 3 *supra*. The Fourth Circuit has suggested another possible exception, at least in the context of Title VII actions. Where plaintiff files his state charge more than 180 days after the alleged violation but within the limitations period provided by state law, the Fourth Circuit would permit plaintiff to file his federal charge

We recognize that the statute can be read, simplistically, as providing that the 300-day filing limit is automatically available to all plaintiffs residing in a deferral state even if plaintiff fails to initiate a state charge within 180 days. The Sixth Circuit has pointed out, however, that the § 626(d)(2) extended period is an available alternative only in "a case to which section 633(b) . . . applies," and we think it only sensible to infer that § 633 does not "apply" unless the complainant has diligently sought a state administrative remedy — if not within the state's limitations period, then at least within the generally longer 180 days afforded plaintiffs in a nondeferral state. *See Gabriele* v. *Chrysler Corp.*, 573 F.2d 949, 955 (6th Cir. 1978), *vacated on other grounds*, 442 U.S. 908, 99 S.Ct. 2819, 61 L.Ed.2d 273 (1979). Any other reading would have Congress arbitrarily extending an additional 120 days in which to file the federal charge simply because the plaintiff's claim fortuitously arose in a deferral state. *See Olson* v. *Rembrandt Printing Co.*, 511 F.2d 1228, 1231-32 (8th Cir. 1975) (en banc) (Title VII). The evident purpose of the extended filing period is to give the plaintiff a grace period within which to pursue state remedies he has invoked before being compelled to institute a federal charge.[8] This purpose would in no way be

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up to 300 days after the alleged violation. *Doski* v. *M. Goldseker Co.*, 539 F.2d 1326, 1332-33 (4th Cir. 1976). It is clear in the present case, however, that appellant did not comply with the applicable four-month state limitations period, R.I. Gen.Laws tit. 28, c. 6, § 10, and thus we do not consider whether this exception is available under the ADEA.

[8] This purpose is clearest in the legislative history of the comparable provision of Title VII, 42 U.S.C. § 2000e-5(e). *See, e.g., Olson* v. *Rembrandt Printing Co.*, 511 F.2d 1228, 1232 n.11 (8th Cir. 1975) (quoting 110 Cong.Rec. 12723 (1964)). Like the Supreme Court in *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 755-58, 99 S.Ct. 2066, 2071-2072, 60 L.Ed.2d 609 (1979), we consider the legislative intent of the Title VII Congress very helpful in discerning the purpose behind certain virtually identical provisions of the ADEA, such as § 626(d). *Cf. Loeb* v. *Textron*, 600 F.2d 1003, 1015 (1st Cir. 1979).

furthered by providing a windfall of 120 days to plaintiffs living in deferral states even though they had not instituted a charge with the state agency within the initial filing period. As the Sixth Circuit has said:

> "One obtains the benefits of the extended filing period in § 626(d)(2) *only* if he is in a 'deferral state' *and* elects to use that state's mechanisms to attempt a conciliation of the grievance. . . . It is only if one uses time to let the state try its hand that he needs more time to notify the Secretary of Labor. . . . [A]ny state filing need only be within the minimum 180 days allowed for the federal filing, § 626(d)(1), in order to obtain the benefits of § 626(d)(2)."

Gabriele v. *Chrysler Corp.*, *supra*, 573 F.2d 949, 955 (6th Cir. 1978) (emphasis in original); *see also Bonham* v. *Dresser Industries, Inc.*, 569 F.2d 187, 192 n.5 (3d Cir. 1977), *cert. denied*, 439 U.S. 821, 99 S.Ct. 87, 58 L.Ed.2d 113 (1978); *Skoglund* v. *Singer Company*, 403 F.Supp. 797, 803 (D.N.H. 1975); *cf. Olson* v. *Rembrandt Printing Co.*, 511 F.2d 1228, 1231-33 (8th Cir. 1975) (Title VII).

While not conclusive, the legislative history of the 1967 ADEA also suggests that the 300 days was intended to benefit plaintiffs who had initially resorted to state remedies:

> "[I]n the case of suits brought by individuals notice of intention to sue must be given the Secretary of Labor within 180 days after the alleged unlawful practice occurred, except that where action *has been commenced* under a State statute this period shall be *extended* to 300 days." (Emphasis supplied.)

S.Rep.No. 723, 90th Cong., 1st Sess., 113 Cong. Rec. 31251 (1967). *See also id* at 31252.

Appellant urges us to adopt the recent holding of the Ninth Circuit that "in a deferral state, an ADEA claimant may provide notice of intent to sue to the Secretary within 300 days of an alleged discriminatory act regardless of whether or not state proceedings have been timely commenced." *Bean* v. *Crocker National Bank*, 600 F.2d 754, 759 (9th Cir. 1979). Appellant argues that the Supreme Court's decision in *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 99 S.Ct. 2066, 60 L.Ed.2d 609 (1979), undercuts the rationale of the earlier cases cited above. In *Evans*, the Court held that resort to state administrative procedures, pursuant to § 633(b), is required before plaintiffs can proceed with a civil action in federal court, but the filing of state charges need not be timely under state law. According to appellant, this holding implies that the extended filing period of § 626(d)(2) should be available without regard to the timeliness of plaintiff's resort to state remedies.

We disagree. The question presented here did not arise in *Evans* because plaintiff in *Evans* had filed his federal charge within 180 days of the alleged violation. The contention in *Evans* was that plaintiff need not file a notice of intent to sue with the state agency at all. *See Gabriele* v. *Chrysler Corp.*, 573 F.2d 949 (6th Cir. 1978) (vacated in light of *Evans*, 442 U.S. 908, 99 S.Ct. 2819, 61 L.Ed.2d 273 (1979)). The Supreme Court rejected this contention, holding that resort to state remedies — whether timely or not — was a prerequisite to maintenance of a federal court suit. The Court said nothing, however, to indicate that a deferral state plaintiff who waited more than 180 days before filing *any* administrative charge would nonetheless be entitled to the extended filing period. On the contrary, the only passage in the Court's opinion that even obliquely touched on this issue suggested that the 180-day limit does apply to the filing of state charges in deferral states. In answering the argument that its decision

to disregard state statutes of limitations would encourage plaintiffs to sidestep state procedures, the Court stated:

> "In any event, even if the risk of bypass of state agencies were real, which it is not, States could readily avoid the possibility by extending their limitations periods to 180 days and by tolling their statutes of limitations upon the filing of a timely charge with the Department of Labor."

441 U.S. at 764 n.11, 99 S.Ct. at 2076. As we read it, this statement implies that the state limitations period on filing of state charges will be harmonized with the federal period for filing such charges if both are set at 180 days. There is certainly no implication here that state and federal charges can be filed concurrently *more than* 180 days after an alleged violation. While this language is, to be sure, less than conclusive, it undercuts appellant's contention that *Evans* is inconsistent with our resolution of the issue in the present case.

We hold that the district court correctly interpreted and stated the statutory period applicable upon the present facts.

Affirmed.

Appendix C.

Supreme Court of the United States

No. 79-1970.

VALENTINE R. CICCONE,
Petitioner,

v.

TEXTRON, INC.

ON WRIT OF CERTIORARI to the United States Court of Appeals for the First Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and brief in opposition,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and that this cause is remanded to the United States Court of Appeals for the First Circuit for further consideration in light of *Mohasco Corp.* v. *Silver*, 447 U.S. ____ (1980).

IT IS FURTHER ORDERED that the petitioner, Valentine R. Ciccone, recover from Textron, Inc. One Hundred Dollars ($100) for their costs herein expended.

October 20, 1980

Clerk's costs: $100

Appendix D.

United States Court of Appeals

For the First Circuit

No. 79-1541

VALENTINE R. CICCONE,
PLAINTIFF, APPELLANT,
v.
TEXTRON, INC., ET AL.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND
[HON. RAYMOND J. PETTINE, *U.S. District Judge*]

BEFORE COFFIN, *Chief Judge*,
CAMPBELL AND BOWNES, *Circuit Judges*.

A. Lauriston Parks, *Robert D. Parrillo*, and *Hanson, Curran & Parks* on brief, for appellant.

Leroy D. Clark, General Counsel, *Constance L. Dupre*, Acting Associate General Counsel, *Vincent Blackwood*, Assistant General Counsel, *William NG*, and *Karen MacRae Smith*, Attorneys, Equal Employment Opportunity Commission, on brief for Equal Employment Opportunity Commission, amicus curiae.

Michael P. DeFanti and *Hinckley, Allen, Salisbury & Parsons*, on brief, for appellees.

January 19, 1981

PER CURIAM. Pursuant to the Supreme Court's order of October 20, 1980 vacating and remanding our prior decision in this case, *Ciccone* v. *Textron, Inc.*, 616 F.2d 1216 (1st Cir. 1980), and after supplemental briefing by the parties, we reconsider this appeal in light of *Mohasco Corp.* v. *Silver*, 447 U.S. ____, 100 S.Ct. 2486 (1980).

In our earlier decision, we held that a complainant under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34, whose claim arose in a deferral state is not entitled to the extended 300-day federal filing period unless he "has diligently sought a state administrative remedy — if not within the state's limitations period, then at least within the generally longer 180 days afforded plaintiffs in a nondeferral state." *Ciccone, supra*, 616 F.2d at 1220. For reasons set forth therein, we thought this the most reasonable and consistent interpretation of an intractable statute. In *Mohasco*, however, faced with the almost identical provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(c), (e), the Court stated that the extended 300-day filing period was to be allowed regardless of a claimant's failure to seek a state administrative remedy within 180 days. The rationale in *Mohasco* strongly suggests, if it does not compel, the conclusion that it is to control in situations such as the present. To be sure, language in the Supreme Court's recent decision in *Delaware State College* v. *Ricks*, ____ U.S. ____, 49 U.S.L.W. 4058 (Dec. 15, 1980), leaves some slight room for argument that our position was not entirely foreclosed by *Mohasco*. *See* 49 U.S.L.W. at 4061 n.13, *id.*, at 4062 n.2 (Stewart, J., dissent-

ing). But we explained our thinking in *Ciccone*, which the Court cited in *Mohasco* in criticizing the approach we and other courts had taken. *Mohasco, supra*, 100 S.Ct. at 2491 nn. 16 & 19. It might well appear unseemly were we now to persist in a rationale which, although widely adopted by the circuits, seems to have found little favor with the Court. Moreover, there is something to be said for trying to achieve uniformity even if the rule adopted may seem less than optimal. We accordingly hold, on the authority of *Mohasco*, that the longer period of 300 days is to be allowed for federal filing in deferral states. *Accord Davis* v. *Calgon Corp.*, 627 F.2d 674 (3d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3485 (Jan. 13, 1981), *denial of cert. suspended*, No. A-604 (80-529) (January 14, 1981); *Bean* v. *Crocker National Bank*, 600 F.2d 754 (9th Cir. 1979). The technical niceties are discussed in *Mohasco, supra*, 100 S.Ct. at 2491-92 & n. 16; 2500-01 (Blackmum, J., dissenting).

Reversed and remanded for further proceedings consistent with this opinion.